Supreme Court, U. S.
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IN THE

SUPREME COURT OF THE UNITED STATES

1979

No. 79-291

JAMES THOMAS GRISSOM,

Petitioner

v.

UNITED STATES OF AMERICA

PETITION FOR A WRIT OF
CERTIORARI

TO THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

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INDEX

	Page
Opinions Below	1
Jurisdiction	2
Questions Presented	2
Constitutional Provisions Involved.....	3
Statement of the Case	4
Reasons for Granting The Writ	5
Conclusion	20
Appendix A	21
Appendix B	23
Appendix C	25

CASE CITATIONS

Bridges v. Union Railway Company, 355 F.2d 382, 387 (6th 1966).....	6
Bruno v. United States, 308 U.S. 287.....	6
Cross v. United States, 335 F.2d 987, at 989 (D.C. Cir. 1964).....	15, 16
Drew v. United States, 331 F.2d 85, at 88 (D.C. 1964).	15, 16
Gregory v. United States, 369 F.2d 185.....	11
Kotteokos v. United States 328 U.S. 750, 764-65 (1945)	6, 7
Raffel v. United States, (6th Cir.,) 46 S. Ct. 566, 271 U.S. 494, 70 L.Ed. 1054, at 1058 (U.S. S. Ct., 1926).....	15
Riley v. United States, 411 F.2d 1146 (9th Cir. 1969).....	10

Russell v. United States,
369 U.S. 749 (1962)..... 9, 10
Spring Company v. Edgar,
99 U.S. 645 657-58 (1878).. 6
United States v. Amaral,
488 F.2d 1148, 1152 (9th
1973)..... 6
United States v. 657.94
Acres of Land, Etc..... 6
United States v. Calabro
468 F.2d 973 (2nd Cir.
1972)..... 9
United States v. Daniels,
466 F.2d 967, at 969
(6th Cir. 1971)..... 19
United States v. Derrick,
519 F.2d 1 (6th Cir.
1975)..... 19
United States v. Latimer,
415 F.2d 1288 (6th Cir.,
1969)..... 19
United States v. Masselli,
534 F.2d 1197 (6th Cir.
1976)..... 10
United States v. Moody, 371
F.2d 688 (6th Cir. 1967)... 19
United States v. Nance,
533 F.2d 699 (D.C. Cir.
1976)..... 9
United States v. Ray, 514
F.2d 418 (7th Cir. 1975)... 9
United States v. Wiley,
278 F.2d, 500 (7th Cir.
1960)..... 19

5th Amendment to the
Constitution of the United
States..... 3

6th Amendment to the
Constitution of the
United States..... 3

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The petitioner, James T. Grissom, prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals, Sixth District rendered on June 20, 1979.

OPINIONS BELOW

The order affirming the judgment of the United States District Court for the Eastern District of Tennessee appears at Appendix A, infra, pp. The order denying the petition for a rehearing appears at Appendix B, infra, pp. . The order of the Court of Appeals staying the Mandate pending review by the Supreme Court appears at Appendix C, infra, pp. .

JURISDICTION

The order affirming the petitioner's conviction was filed June 20, 1979. A petition for rehearing was filed which was denied on July 23, 1979. This petition for certiorari was filed less than 30 days from the date aforesaid. The jurisdiction of this court is invoked under 28 U.S.C.A. § 1254 (1).

QUESTIONS PRESENTED

1. Whether the affirmance of a conviction of a defendant, which is based upon the admission of plainly erroneous evidence, contravenes the Due Process Clause of the Fifth Amendment.

2. Whether the affirmance of a conviction of a defendant, which is based upon a fatally defective indictment, contravenes the Due Process Clause of the Fifth Amendment, the Sixth Amendment guarantees to be apprised of a charge against him, and the Fifth Amendment right to endictment by a grand jury.

3. Whether the affirmance of a conviction of a defendant, wherein the trial court denied defense counsel's request for a list of the government's witnesses and denied his request for an order compelling the government's chief witness to discuss the facts of the case with defense counsel, denied the defendant the effective assistance of counsel as guaranteed by the Sixth Amendment.

4. Whether the affirmance of a conviction of a defendant, wherein the trial court failed to grant a severance of charges thereby forcing the defendant to take the stand, contravened the defendant's Fifth Amendment right to remain silent.

5. Whether the affirmance of a conviction of a defendant, wherein the defendant was sentenced substantially more severely than a co-defendant, denies a defendant the Fifth Amendment guarantee of equal protection.

CONSTITUTIONAL PROVISIONS INVOLVED

Constitution of the United States, Amendment V:

> "No person shall ... be deprived of life, liberty, or property, without due process of law; ..."

Constitution of the United States, Amendment V:

> "No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, ..."

Constitution of the United States, Amendment V:

> "No person shall...be compelled in any criminal case to be a witness against himself,..."

Constitution of the United States, Amendment VI:

> "In all criminal prosecutions, the accused shall...be informed of the nature and cause of the accusation;..."

Constitution of the United States, Amendment VI:

> "In all criminal prosecutions, the accused shall...be informed of the nature and cause of the accusation;..."

Constitution of the United States, Amendment VI:

> "In all criminal prosecutions, the accused shall enjoy...the Assistance of Counsel for his defense."

STATEMENT OF THE CASE

1. Petitioner, James Thomas Grissom, was charged in a two count indictment alleging two violations of Title 18, U.S.C.A. Sections 2 and 841 (a) (1) (being sales of narcotics, and specifically cocaine). Petitioner was arraigned in the United States District Court for the Eastern District of Tennessee. The case went to trial before a jury and on September 18, 1978, Petitioner was found not guilty as to count one of the indictment and guilty as to count two.

Thereafter, on October 13, 1978, the trial court sentenced Petitioner to a period of seven (7) years confinement, plus mandatory subsequent parole of three (3) years on count two.

2. On October 13, 1978, a Notice of Appeal to the United States Court of Appeals for the Sixth Circuit was filed. Said Notice of Appeal and subsequent Brief on behalf of Petitioner were filed by petitoner's court-appointed attorney, Robert M. Stivers, Nashville, Tennessee. Prior to the decision of the Court of Appeals, Petitioner caused to be filed a Motion for Leave to File a Supplemental Brief, which Motion requested leave for attorney Henry E. Sheldon to raise additional assignments of error on Petitioner's behalf.

3. On May 31, 1979, the Court of Appeals denied the Motion without a hearing and without indicating any reasons for that action. On June 20, 1979, the Court affirmed the judgment of conviction of the District Court without opinion.

A timely Petition for Rehearing was filed with the Court of Appeals for the Sixth Circuit which was denied on July 23, 1979.

On August 13, 1979, the Court of Appeals upon Motion of Defendant ordered that the Mandate of the District Court be stayed pending review by this Court on Certiorari.

REASONS FOR GRANTING THE WRIT

A. THE TRIAL COURT COMMITTED PLAIN ERROR, WITHIN THE MEANING OF RULE 52 (b) OF THE FEDERAL RULES OF CRIMINAL PROCEDURE, IN ALLOWING AGENT JERRY OWENSBY TO TESTIFY THAT CERTAIN FIGURES ON THE BACK OF A BUSINESS CARD, WRITTEN BY THE DEFENDANT, JAMES GRISSOM, WERE PRICES OF HUGE AMOUNTS OF COCAINE (APPENDIX, pp. 51A-52A).

Agent Owensby testified at the trial of the Defendant, Grissom, that certain figures on the back of a business card were prices of pounds of cocaine. That testimony was in response to a question by the Government's Attorney which asked:

"Officer Owensby, what did you understand the figures to be on the back of the card?"

The obvious import of this question is that special knowledge is necessary to interpret the innocuous figures printed on the card.

It is elementary that before a witness may act as an expert in a criminal case, to interpret this alleged narcotics dealer's notation, that the witness must be qualified as an expert in the area under consideration, to-wit, interpreting narcotics dealer's symbolic

notation. (Spring Company -vs- Edgar, 99 U.S. 645 657-58 (1878); United States -vs- Amaral, 488 F.2d 1148, 1152 (9th 1973); Bridges -vs- Union Railway Company, 355 F.2d 382, 387 (6th 1966); United States -vs- 657.94 Acres of Land, Etc., State of Missouri, 311 F. Supp. 1018 (D.C. Mo. 1970). In this case there is absolutely no attempt to qualify Agent Owensby by means of training, schooling or experience. Without such qualification by means of proper foundation, the testimony of Agent Owensby was clearly inadmissible.

From a review of the record it is manifest that no objection was made by counsel for Grissom to Agent Owensby's expert opinion testimony. The issue resolves itself to a consideration of whether the admission of the testimony was plain error. The test to be applied in determining if a trial court committed plain error was set forth in Kotteokos -vs- United States, 328 U.S. 750, 764-65 (1945), wherein the Court stated:

> "If, when all is said and done, the conviction is sure that the error did not influence the jury, or had but a very slight effect, the judgment should stand, except perhaps where the departure is from a constitutional norm or a specific command of Congress. Bruno -vs- United States, supra, at 294. (Bruno -vs- United States, 308 U.S. 287). But if one cannot say, with fair assurance, after pondering all that happened without stripping the erroneous action from the whole, that the judgment was not substantially swayed by the error, it is impossible to conclude

> that substantial rights were not affected. The inquiry cannot be merely whether there was enough to support the result, apart from the phase affected by the error. It is rather, even so, whether the error itself had substantial influence. If so, or if one is left in grave doubt, the conviction cannot stand."

The testimony of Agent Owensby here under consideration clearly implied that Grissom was a dealer or middleman for huge amounts of cocaine. And immediately following this testimony is the critical testimony considering substance of the transaction encompassed by Count II, for which the Defendant Grissom was convicted. Under Kotteokos, "it is impossible to conclude that substantial rights were not affected."

Therefore, the trial court committed prejudicial error in admitting the expert testimony of Agent Owensby. The conviction of the Defendant, Grissom, must be reversed, under Rule 52 (b), Federal Rules of Criminal Procedure.

B. THE DEFENDANT WAS DENIED THE RIGHT TO BE PROSECUTED BY INDICTMENT AND WAS PREJUDICED BY A MATERIAL MISCITATION OF THE APPLICABLE CRIMINAL STATUTE IN THE INDICTMENT.

The indictment returned in this case charged the Defendant with two counts of violating Title 18, U.S.C. 2 and 841 (a) (1). The wording of the indictment was that the Defendant, James Hutchinson, Richard Chandler, and Deborah Baker

> "each aided and abetted by the other, knowingly and intentionally did distribute about 4.8 grams (27.7 in

Count Two) of cocaine hydrochloride, a Schedule II narcotic controlled drug substance."

In parentheses under that wording appears the statutory citation as required by Rule 7 of the Federal Rules of Criminal Procedure, the citation in this indictment being: "(Title 18, U.S.C., 2 and 841 (a) (1))." The citation to Title 18 U.S.C. 841 is not a correct reference to the statute under which the Defendant was charged, and this miscitation resulted in prejudice to the Defendant.

First, the miscitation was to the substantive offense being charged. The Defendant was alleged to have aided and abetted in the distribution of cocaine. However, the substantive offense alleged does not appear at Title 18 U.S.C. 841 (a) (1) as charged in the indictment. Rather, the offense described in the indictment is governed by Title 21, U.S.C. § 841 (a) (1) which states:

> (a) ... it shall be unlawful for any person knowingly or intentionally ---
>
> (1) to manufacture, distribute, or dispense, or possess with intent to ... distribute ... a controlled substance.

This statute was not cited in the indictment, in violation of Rule 7, Federal Rules of Criminal Procedure. Rule 7 requires that an indictment or information shall state for each count the citation of the statute alleged, and this requirement was not met in the present case.

The trial court must be charged with notice prior to trial of the incorrect citation. In an Order filed with the Court by Robert P. Murrian, United States Magistrate, reference is specifically made to the mistaken citation. The Magistrate states in footnote 2 (App. 27A):

> "Apparently the latter statute should be cited as 21 U.S.C. § 841 (a) (1) in both counts."

Despite this reference, the trial court took no steps to dismiss or cause the indictment to be amended. In fact, the trial court cited an incorrect statute to the trial attorneys immediately prior to sentencing. The statute cited by the Court, Title 18 U.S.C. § 341 (a) (1), (App. 164 A) is apparently non-existent.

An indictment may be so fatally defective that even a bill of particulars which clarifies the charge will not cure the prejudice. Russell -vs- United States, 369 U.S. 749 (1962); United States -vs- Nance, 533 F.2d 699 (D.C. Cir. 1976). The indictment in this case was clearly defective in failing to comply with the Federal Rules of Criminal Procedure.

As an independent ground for reversal of Defendant's conviction, the defective indictment violated fundamental constitutional rights. The Sixth Amendment guarantees that the Defendant be informed of the charge against him and the Fifth Amendment guarantee of the right to indictment by a grand jury require that the indictment adequately apprise the Defendant of the charge against him so that he may prepare a defense. United States -vs- Ray, 514 F. 2d 418 (7th Cir. 1975); United States -vs- Calabro 468 F.2d 973 (2nd Cir. 1972).

The indictment in this case is a patent violation of those guarantees.

The miscitation in the indictment also resulted in a variance between the offense charged and the proof offered at trial. When such a variance destroys a Defendant's right to be tried only on the charges present in the indictment, this is reversible error. United States -vs- Masselli 534 F.2d 1197 (6th Cir. 1976); Riley -vs- United States, 411 F.2d 1146 (9th Cir. 1969); Russell -vs- United States, 369 U.S. 749 (1962).

Therefore, Defendant should be allowed to further brief this substantial constitutional question on appeal.

REASONS FOR GRANTING THE WRIT

C. THE TRIAL COURT ERRED IN FAILING TO GRANT DEFENDANT'S REQUEST FOR A LIST OF THE GOVERNMENT'S WITNESSES, AND IN REFUSING TO REQUIRE AGENT OWENSBY TO DISCUSS THE FACTS OF THE CASE WITH THE DEFENDANT'S COUNSEL.

On or about May 8, 1978, a Motion for Discovery pursuant to Federal Rule of Criminal Procedure 16, and a supporting sworn Memorandum of Fact and Law were filed with the trial Court; on that same date, the government filed its response to that Motion; thereafter, on May 15, 1978, the Motion of the Defendant was denied by the trial Court orally. As reflected by these Motions, responses, and orders, the defendant sought to be provided with a list of witnesses so that he might prepare for trial, pursuant to his rights under the Sixth and Fourteenth Amendments to the Constitution of the United States, regarding the right to

effective assistance of counsel, and due process; also these pleadings accurately reflect that the undercover agent, who apparently made the purchases of narcotics in question, Agent Jerry L. Owensby refused to discuss any facts regarding the cases with the counsel for the defendant, because he was not authorized to do so, with the government's response being that the government does not have the pwoer to order a witness to submit an interview, which of course, does not respond to the issue.

By way of legal argument, the defendant would initially state that the denial of the knowledge of the witnesses who would appear to testify against him, and the refusal of an employee and agent of the plaintiff government to discuss the case with the counsel for the defendant are direct denials of the right of effective assistance of counsel and due process, under the Sixth and Fourteenth Amendments to the Constitution of the United States. With regard to the provision of the list of witnesses, the defendant would assert that the reasoning behind the requirement of 10 U.S.C.A. Section 3432 of the provision of such a list in a capital case should be applicable to any federal felony prosecution, and would cite its support thereof the 1966 opinion of the Court of Appeals for the District of Columbia in Gregory vs. United States, 369 F.2d 185, wherein the Court pointed out, at pages 188 and 189, that counsel for the defendant has a duty to interview all witnesses, and that the supplying of names of all potential witnesses in a criminal case would assist in the quest for truth, as well as providing a pre-trial determination as to what evidence might be exculpatory from any of these witnesses.

Further, at page 188, the Court pointed out that the opportunity to investigate and interview witnesses in the case is one that is required not only by statute in regards to a capital case but is further required by elemental fairness and due process.

In the case at hand, a government agent, Agent Owensby stated that he would not discuss the matter with counsel because he had not been authorized to do so; nothing in the record indicates who could provide such authorization, within the multi-pronged federal prosecution approach, but it does appear quite clearly that the United States Attorney has complete and total control over the prosecution of cases in the District Court.

It is the contention of the defendant that the denial of the list of witnesses, and the denial of the right to interview Agent Owensby caused the defendant to suffer the following prejudice:

a. Further devleopment of proof of the unnamed person Nancy as being the seller of the drugs, not the defendant;

b. Discussion and determination of who in fact executed one of the two handwritten cards introduced as evidence in the cause;

c. The names of persons who were present or not present at the sale alleged in count one of the indictment;

d. Further examination of what was seen by Drug Enforcement Administration Agent Thomas Stafford during his surveillance at the second sale;

e. Prepare and file a Motion to Dismiss count one of the indictment prior to the time of trial, it appearing that there was not contact for a successful sale of drugs made between Agent Owensby and the defendant with regard to count one, it appearing during the course of trial that the only contact with regard to any such sale was made by a confidential informant to the defendant, and not by a testifying witness;

f. Finally, that the denial of an interview denied counsel for the defendant the right to more adequately move for a severance of the two counts prior to the time of trial by denying him the fight to show facts supporting the relative strengths of the two counts as to prosecution, the disparity of circumstances for the conduct of the sale itself between count one and count two, to more fully develop and demonstrate the separateness of defenses to be advanced by the defendant, and to provide more factual basis for determining whether or not the defendant should testify in the cause.

D. THE TRIAL COURT ERRED IN FAILING TO GRANT SEVERANCE FOR TRIAL OF THE TWO COUNTS OF THE INDICTMENT, UNDER FEDERAL RULE OF CRIMINAL PROCEDURE 14.

On April 10, 1978, Motion for Dismissal and/or Severance under Federal Rules of Criminal Procedure 8 (a) and 14, with a supporting Memorandum of Fact and Law, were filed by the defendant Grissom; thereafter, reference to the United States Magistrate regarding issues raised by the Motion was made, and the government was ordered to respond. On April 24, 1978, the United States Magistrate filed a report stating that the Rule 8 Motion should be denied; thereafter, response regarding the Rule 14 Motion was made by the government. On April 28, 1978,

the Report and Order of the United States Magistrate was rendered to the trial Court, the same being accepted by the trial Court on May 15, 1978, overruling the defendant's Motion for Severance or Dismissal. The Motion for Severance was orally renewed at the time of trial, and again denied by the trial Court. The defendant contends that this denial of severance prejudiced him in the presentation of his case in a number of ways, as hereinafter described in detail, specifically with regard to the denial of relief under Rule 14 of the Federal Rules of Criminal Procedure.

Basically, Federal Rule of Criminal Procedure 14 provides that if a defendant is prejudiced by the joinder of separate offenses and separate counts for trial, the trial Court may either order an election of which counts or count to proceed upon, or order separate trials for the separate counts; a general discussion of the dangers of such a prejudicial joinder as to an individual defendant are found in Wright, Federal Practice and Procedure, Section 222, at page 437. Generally, five particular issues of prejudice, or dangers which might arise in the joinder of separate counts for trial are: (1) the defedant may become embarrassed or confounded in presenting separate offense; (2) the jury may use the evidence of one of the crimes charged to infer criminal disposition on the part of the defendant from which is found his guilt for the other crime or crimes charged; (3) the jury may cumulate the evidence of the various crimes charged and find guilt, when, if considered separately, it would not do so; (4) the jury may develop a latent feeling of hostility engendered by the charging of several crimes as distinct from only one; (5) the

defendant may be prejudiced when he wishes to testify on one, but not the other, of two joined offenses which are clearly distinct in time, place and evidence. Drew vs. United States, 331 F.2d 85, at 88 (D.C., 1964) Cross vs. United States, 335 F.2d 987, at 989 (D.C. Cir. 1964). Further it has been held that the acquittal of one of the two counts involved by the jury does not cure the effect of the prejudice, Cross vs. United States, ibid. at 990 and 991.

a. PREJUDICE: That the defendant was required to waive his rights under the Fifth Amendment to the Constitution of the United States and testify with regard to count two of the indictment, where he would not have done so had the counts been separated for trial.

The defendant would assert that he was required to testify during his proof in chief and subject himself to cross examination against his wishes, and when the same was not at his best interest, because he desired to testify with regard to the incident alleged in count one of the indictment.

When a defendant takes the witness stand, he can be asked relevant and competent questions, regarding any of the counts of an indictment, and cannot elect to stand partially silent under the Fifth Amendment, Raffel vs. United States, (6th Cir.,) 46 S. Ct. 566, 271 U.S. 494, 70 L.Ed. 1054, at 1058 (U.S. S. Ct., 1926). In Cross vs. United States, supra, at 989, the Court recognized that a defendant is entitled to make his decision on whether or not to testify based on the government's evidence,

his own evidence other than his testimony, the plausability of his testimony, the possible effects of his demeanor, the government's right of impeachment, and the damage to be done by cross-examination; the court further recognized that if two counts are joined for trial, the defendant is not entitled to weigh these factors, or make this decision, with regard to the counts as separately.

b. PREJUDICE: That, because of the joinder of the counts the defendant was required to present separate, and inconsistent, defenses with regard to the two counts of the indictment.

Factually, the defendant asserted as a defense to count one that he was not present, and did not engage in any criminal conduct, and was unaware of criminal conduct, while the government, through its agent, contended that the defendant procured the original sale by arranging the same; with regard to count two; the defendant was required to admit his presence; and admit his knowledge of what was occurring, but stood on the theory that he was not involved in the transaction, and had no involvement therein; the presentation, and inconsistency of these defenses, can best be viewed by a comparison between the testimony of Agent Owensby with the testimony of the defendant, Grissom.

The disasterous results of attempting to present such inconsistent defenses are found throughout all of the cases cited regarding this issue, but are best described in Cross vs. United States, supra, at 989 and 990, Drew vs. United States, supra at pages 88 and 89.

c. PREJUDICE: That the joinder of counts for trial allowed the government to present to the jury evidence of a subsequent crime, the evidence regarding count two, in the trial of another case, being the charge found in count one.

Simply, agent Owensby was allowed to testify in the charge of aiding and abetting a sale of cocaine on December 2 that the Defendant Grissom had engaged in a subsequent crime on December 14.

E. THE TRIAL COURT ERRED IN ITS IMPOSITION OF SENTENCE AS TO THIS DEFENDANT

On October 13, 1978, the trial Court sentenced the defendant to the term of seven years, subject to parole at the time the Board of Pardons and Paroles should select, based on the verdict of the jury of guilt as to Count Two of the original indictment. The defendant seeks relief from the imposition of this sentence, either by a reversal and remand for reconsideration of the severity of the same by the trial Court, or the fixing of a reasonable sentence by this Court; the defendant would state and agree that the sentence imposed in this cause is within the statutory limit set by law for a conviction of this violation.

Factually, several reasons are asserted by the defendant for his contention that the sentence in this case was a gross abuse of discretion on the part of the trial Court, as well as being imposed factually in error. Initially, the defendant would point out the disparity between the sentence rendered to him by Judge Taylor, and the sentence rendered to his co-defendant, Hutchison, and approved

by the same trial Court. While Mr. Grissom received a seven year sentence, Mr. Hutchison received a three year sentence, but with all but six months thereof suspended, and that this six months was to be served in a jail like institution, as opposed to the Federal Penitentiary. Mr. Hutchison was the principal in the Count where Mr. Grissom was convicted of aiding and abetting, and testified before the jury that the cocaine sold belonged to Mr. Hutchison and that Mr. Hutchison received Two Thousand ($2,000.00) Dollars of the total sales price of Two Thousand Two Hundred ($2,200.00) Dollars. This record affirmatively shows that the aider and abetter received a sentence of some fourteen times more confinement than did the principal in the case. Additionally, it will be noted that the defendant Hutchison entered a plea of guilty, whereas the defendant Grissom interposed a plea of not guilty, and went to trial on both counts.

The record of sentencing in this case indicates the strong possibility that the trial Court imposed a sentence based on a conviction for the sale of cocaine, where the defendant was in fact convicted of aiding and abetting, when the trial Court advised that he was going to deny an appeal bond to prevent the defendant from "getting out there and selling cocaine". It further appears from the record that the trial Court did in fact seek, received, and use opinion and hearsay evidence not contained in the trial, or in the pre-sentence investigation, in determining the sentence of the defendant, particularly being the statement of DEA Agent Stafford at the time of sentencing.

Generally, appellate Courts will not modify sentences imposed within the legislative limits by a trial Court, but this factor does not immunize the trial Court's verdict in and of itself, United States vs. Daniels, 466 F.2d 967, at 969 (6th Cir. 1971), Yates vs. United States, 356 U.S. 363, 2 L. Ed. 2d 837, 78 S. Ct. 766. Appellate review of sentencing, under appropriate circumstances, can, and does, lead to, in appropriate instances, a reversal and remand for reconsideration of sentence by the trial Court, or, in the alternative, a fixing of a corrected and reasonable sentence by the appellate court, United States vs. Daniels, supra, Yates vs. United States, supra, United States vs. Wiley, 278 F.2d, 500 (7th Cir., 1960), United States vs. Moody, 371 F.2d 688 (6th Cir. 1967), United States vs. Latimer, 415 F.2d 1288 (6th Cir., 1969), United States vs. Derrick, 519 F.2d 1 (6th Cir., 1975).

It is the contention of the defendant that the unwarranted severity of this sentence in view of the facts and circumstances in the case requires at the minimum a reversal and remand of the cause for resentencing by the trial Court, or requires that this Court fix a correct and reasonable sentence under the facts of the cause.

CONCLUSION

For these reasons, a writ of certiorari should issue to review the judgment and opinion of the United States Court of Appeals.

Respectfully submitted,

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"APPENDIX A"

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

vs. ORDER

JAMES THOMAS GRISSOM,
Defendant-Appellant

Before: EDWARDS, Chief Judge, ENGEL, Circuit Judge, and BROWN,* District Judge.

On receipt and consideration of an appeal in the above-styled case wherein appellant Grissom appeals directly from his jury conviction for sale of a controlled substance, in violation of 18 U.S.C. § 42 (1976) and 21 U.S.C. § 841 (a) (1) (1976); and

Finding no abuse of judicial discretion in the rulings of the District Judge in refusing to order the government to turn over a list of its witnesses in advance of trial and in refusing to grant

* Honorable Bailey Brown, Chief Judge, United States District Court for the Western District of Tennessee, sitting by designation.

severance of the two drug counts upon which appellant was charged; and

Also finding that the seven-year sentence was well within the statutory maximum for the offense concerned and could not on this record be termed an abuse of discretion on the part of the sentencing judge,

Now, therefore, the judgment of conviction is affirmed.

Entered by order of the Court
John P. Hehman, Clerk

by Grace Keller
Chief Deputy

"APPENDIX B"

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

vs. ORDER

JAMES THOMAS GRISSOM,
Defendant-Appellant.

Before: EDWARDS, Chief Judge, ENGEL, Circuit Judge, and BROWN,* District Judge.

On receipt and consideration of a petition for rehearing and a suggestion for rehearing en banc in the above-styled case; and

No judge in active service in this court having moved for en banc reconsideration, and the petition having been referred to the panel which originally heard the case; and

Noting in said petition no issue of substance presented which was not taken fully into account prior to issuance of the court's opinion,

* Honorable Bailey Brown, Chief Judge, U.S. District Court for the Western District of Tennessee, sitting by designation.

Now, therefore, said petition for rehearing is denied.

Entered by order of the Court

John P. Hehman
Clerk

"APPENDIX C"

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

vs. ORDER

JAMES THOMAS GRISSOM,
Defendant-Appellant

Upon consideration of the motion of court-appointed counsel for the appellant for a stay of the mandate pending the filing of a petition for Writ of Certiorari, it is ORDERED that a stay be granted provided that a petiton for Writ of Certiorari is filed in the Supreme Court within thirty (30) calendar days from the file date hereof. No further extensions are to be granted by this Court.

Upon consideration of the motion of court-appointed counsel Robert M. Stivers for leave to withdraw as attorney of record, and it appearing that attorney Henry E. Sheldon of Cincinnati,Ohio has tendered an entry of appearance stating that he will be attorney of record for purposes of filing a petiton for Writ of Certiorari with the Supreme Court, and with the understanding that attorney Sheldon has been privately retained and will not seek appointment under the

provisions of the Criminal Justice Act, it is ORDERED that the motion of court-appointed counsel Stivers to withdraw be and it hereby is granted.

Upon consideration of the motion of attorney Henry E. Sheldon to be substituted as counsel for purposes of filing a petition for Writ of Certiorari with the Supreme Court of the United States, it is ORDERED that the motion be and it hereby is granted.

Upon consideration of the motion of attorney Sheldon for bail pending review by the Supreme Court of any petition for Writ of Certiorari which counsel may file, it is ORDERED that the motion be and it hereby is denied.

Entered by order of the Court

John P. Hehman, Clerk
Clerk

CERTIFICATION OF SERVICE

I, Henry E. Sheldon II, attorney for the Petitioner, do hereby certify that I have caused to be delivered by United States regular mail, to Wade H. McCree, Jr., Solicitor General, United States Department of Justice, Room 5143, 9th & Pennsylvania Avenue, N.W., Washington, D.C. 20530 and to the Honorable Richard K. Harris, Assistant United States Attorney, United States Post Office and Court Building, Knoxville, Tennessee, 37901, a true and exact copy of the foregoing Petition for a Writ of Certiorari, on this _____ day of August, 1979.

HENRY E. SHELDON II

Supreme Court, U. S.
FILED
NOV 3 1979
MICHAEL RODAK, JR., CLERK

No. 79-291

In the Supreme Court of the United States

OCTOBER TERM, 1979

JAMES THOMAS GRISSOM, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

WADE H. MCCREE, JR.
Solicitor General

PHILIP B. HEYMANN
Assistant Attorney General
Department of Justice
Washington, D.C. 20530

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OPINION BELOW

The judgment order of the court of appeals (Pet. App. 21-22) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on June 20, 1979. A petition for rehearing was denied on July 23, 1979 (Pet. App. 23-24). The petition for a writ of certiorari was filed on August 22, 1979. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the district court committed plain error by permitting a narcotics agent to testify as to his opinion about the meaning of certain figures written on the back of petitioner's business card.

2. Whether an error in the citation of a statute in the indictment requires that petitioner's conviction be reversed.

3. Whether the court should have ordered the government to provide petitioner with a list of its witnesses and should have ordered the government's chief witness to submit to an interview by defense counsel.

4. Whether the court committed reversible error in denying a motion to sever the two counts of the indictment.

5. Whether the court abused its discretion in sentencing petitioner.

STATEMENT

Following a jury trial in the United States District Count for the Eastern District of Tennessee, petitioner was convicted of distributing cocaine and aiding and abetting its distribution, in violation of 21 U.S.C. 841(a)(1) and 18 U.S.C. 2.[1] He was sentenced to seven years' imprisonment, to be followed by a three-year special parole term.

1. The evidence at trial showed that on December 2, 1977, Jerry Owensby, an undercover DEA agent, met with petitioner at petitioner's place of business in Knoxville, Tennessee (Tr. 8-11). Owensby told petitioner that he was interested in purchasing an ounce of cocaine that day and that, if the quality of the cocaine were good, he would return within a week or 10 days for a larger amount. Petitioner replied that there would be no

[1]The indictment charged three others as defendants along with petitioner (C.A. App. 5A), but only one of those charged was tried with petitioner. The charges against that co-defendant were dismissed at trial on the government's motion (Tr. 112-113).

problem in supplying large amounts of cocaine, since he received up to three shipments of cocaine per week (Tr. 11). Petitioner then told Agent Owensby to go to petitioner's apartment and to wait there (Tr. 12). Later that day, after a telephone conversation with petitioner, Agent Owensby went to James Hutchinson's[2] apartment in the same building, where five grams of cocaine were delivered to him by Hutchinson in exchange for $400 (Tr. 13-15).

On December 14, 1977, Agent Owensby met with petitioner at the latter's apartment. Petitioner asked Owensby, "[h]ow many do you want," which Owensby interpreted to refer to ounces of cocaine. Owensby replied, "[w]ell, if the price is right I will have one." Petitioner said that the price was $2100, and Owensby agreed to buy one ounce (Tr. 17-18). The two then drove to another apartment complex, where they met Hutchinson who gave Owensby a bag containing approximately 29 grams of cocaine (Tr. 19-21). Owensby then told petitioner and Hutchinson that, if the cocaine were of good quality, he would like to purchase larger amounts in the future and asked what the prices would be (Tr. 21). Petitioner then removed a business card from his wallet and wrote some figures on the card. Similarly, Hutchinson wrote some figures on a different card (Tr. 21). Owensby testified that the figures referred to the prices for various quantities of cocaine (Tr. 22-23). Owensby then paid petitioner $2100 for the cocaine (Tr. 24).

The jury found petitioner not guilty on count 1 (the December 2 sale) and guilty on count 2 (the December 14 sale).

[2]Hutchinson was charged in the same indictment as petitioner but pled guilty before trial and testified for the government (Tr. 78).

The court of appeals affirmed by judgment order (Pet. App. 21-22). It held that the district court had not abused its discretion in refusing to order the government to turn over a list of its witnesses in advance of trial and in declining to grant a severance of the two counts. The court also held that the sentence imposed on petitioner was well within the statutory maximum and could not be deemed an abuse of discretion.

ARGUMENT

1. Petitioner contends (Pet. 5-7) that the district court committed plain error by allowing Agent Owensby to testify about the meaning of the figures petitioner wrote on the back of a business card in response to Owensby's question about the price of larger quantities of cocaine.

This point was not raised in the court of appeals, and it should not be considered here for the first time. See *United States* v. *Lovasco*, 431 U.S. 783, 788 n.7 (1977). In any event, the contention is without merit. Because petitioner wrote the figures in Owensby's presence and in response to Owensby's question about the prices that petitioner would charge for different amounts of cocaine (see Tr. 21), it was entirely proper for Owensby to testify that he understood the figures to be a price list for varying quantities of cocaine. This was not an expert opinion; it was simply an opinion or inference that was "rationally based on the perception of the witness." Fed. R. Evid. 701. It was therefore within the discretion of the court to admit Owensby's testimony. See *United States* v. *Mandujano*, 499 F. 2d 370 (5th Cir. 1974), cert. denied, 419 U.S. 1114 (1975).

Moreover, as petitioner concedes (Pet. 6), no objection was made to the question at trial. Even assuming that the testimony should not have been admitted, its admission is

clearly not a "plain error" that seriously affects "substantial rights" of the accused. See Fed. R. Crim. P. 52(b). In light of Owensby's first-hand account of the cocaine transaction, the testimony as to the figures could have had little effect on the verdict. Admission of that testimony is certainly not a ground for reversal in the absence of an objection at trial.[3]

2. Petitioner next argues (Pet. 7-10) that the indictment must be dismissed because it miscited the narcotics distribution statute. The indictment charged that petitioner violated "18 U.S.C. 841(a)(1)," while it should have been charged that he violated "21 U.S.C. 841(a)(1)." This point also was not raised in the district court or in the court of appeals and therefore should not be considered here. In any event, it is frivolous.

Petitioner makes no claim that he was misled by the technical citation error, nor could he. He was properly advised as to the nature of the charges against him. The indictment alleged each of the elements of the offense of unlawful distribution of a controlled substance that is prohibited by 21 U.S.C. 841(a)(1). In addition, the indictment identified the substance, the amount distributed on both occasions, the names of the persons involved in the distributions, and the precise dates that the two distributions occurred (C.A. App. 5A). Rule 7(c)(3) of the Federal Rules of Criminal Procedure specifically provides that an error in the citation of a statute "shall not be ground for dismissal of the indictment or information or for reversal of a conviction if the error or omission did not mislead the defendant to

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[3]Petitioner's reliance (Pet. 6-7) on *Kotteakos* v. *United States*, 328 U.S. 750 (1946), is misplaced. *Kotteakos* discusses the standard for harmless error (see Fed. R. Crim. P. 52(a)), not the standard for plain error that is applicable when no objection has been made at trial.

his prejudice." See *Steinert* v. *U.S. District Court*, 543 F.2d 69 (9th Cir. 1976); *United States* v. *Garner*, 529 F.2d 962, 966 (6th Cir.), cert. denied, 426 U.S. 922 (1976).

3. Petitioner next contends (Pet. 10-13) that the district court erred when it declined to provide him with a list of witnesses prior to trial, and when it refused to order Agent Owensby to submit to an interview by defense counsel.

It is firmly established that a defendant is not entitled to a list of the government's witnesses except in a capital case. Cf. 18 U.S.C. 3432. See *United States* v. *Little*, 562 F.2d 578, 581 (8th Cir. 1977); *United States* v. *Mitchell*, 540 F.2d 1163 (3d Cir. 1976), cert. denied, 429 U.S. 1099 (1977); *United States* v. *Jordan*, 399 F.2d 610, 615 (2d Cir.), cert. denied, 393 U.S. 1005 (1968).

Nor is there any authority for petitioner's proposition that the court erred by refusing to order Agent Owensby to submit to an interview with defense counsel. In *Gregory* v. *United States*, 369 F.2d 185 (D.C. Cir. 1966), relied upon by petitioner, the court disapproved the prosecutor's instructions to government witnesses that they should not talk with defense counsel unless the prosecutor was present. But the courts have uniformly held that if a witness does not wish to submit to an interview with one side or another, his wishes must be respected. See *United States* v. *Matlock*, 491 F.2d 504, 506 (6th Cir.), cert. denied, 419 U.S. 864 (1974); *United States* v. *White*, 454 F.2d 435, 438-439 (7th Cir. 1971), cert. denied, 406 U.S. 962 (1972); *United States* v. *Dryden*, 423 F.2d 1175, 1177 (5th Cir.), cert. denied, 398 U.S. 950 (1970); *Byrnes* v. *United States*, 327 F.2d 825, 832-833 (9th Cir.), cert. denied, 377 U.S. 970 (1964). And it has been expressly held that it is not error for the court

to decline to order a witness to talk to defense counsel. See *United States* v. *Rice*, 550 F.2d 1364, 1374 (5th Cir. 1977); *United States* v. *Mirenda*, 443 F.2d 1351, 1356 (9th Cir.), cert. denied, 404 U.S. 966 (1971).

4. Petitioner further contends (Pet. 13-17) that the two counts should have been severed for trial. This claim is without merit. The two charges were closely related, as was demonstrated by the government's evidence at trial.[4] Both counts were "of the same or similar character" and also were based on two "transactions connected together." Fed. R. Crim. P. 8(a). Accordingly, joinder of the two offenses was indisputably proper. See, *e.g.*, *United States* v. *Sanders*, 463 F.2d 1086 (8th Cir. 1972); *United States* v. *Kellerman*, 432 F.2d 371, 374 (10th Cir. 1970).

Petitioner has not established that he was prejudiced by the failure to grant a severance. He contends that the joinder made his defense more difficult because it forced him to take the stand and to adopt somewhat inconsistent defenses with respect to the two charges.[5] However, the fact that the joinder may have made petitioner's defense more difficult does not mean that it did so unfairly. Putting a defendant in a position that makes it awkward

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[4]Agent Owensby purchased the first portion of cocaine as a sample; he and the defendants understood that that sale would lead to further sales in the future. In fact, Owensby specifically indicated that, if the sample were satisfactory, he would return for a larger amount within approximately a week to 10 days (Tr. 11). Twelve days after the first sale, Owensby returned and made the second purchase. That purchase was a direct result of the first purchase.

[5]Petitioner also notes (Pet. 17) that the joinder permitted the jury to hear evidence of two crimes. This factor, of course, is present in any case where two offenses are joined, and it cannot require a severance.

for him to adopt inconsistent defenses is hardly unfair.[6] Similarly, just because the joinder of charges may have reduced the tactical advantage to petitioner of remaining silent at trial does not mean that the joinder violated his Fifth Amendment right against compulsory self-incrimination.[7] A decision whether to grant a severance is committed to the discretion of the trial court, and the denial here was a proper exercise of that discretion. See *Opper* v. *United States*, 348 U.S. 84, 95 (1954).

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[6]In any event, petitioner's defenses to the two charges were not necessarily inconsistent. His defense to the first count was that he was not present at and did not participate in the sale; his defense to the second count was that he was present during, but did not participate in, the sale (Pet. 16). With respect to both sales, he suggested that it was Hutchinson who was the guilty party.

[7]Petitioner relies on *Cross* v. *United States*, 335 F.2d 987 (D.C. Cir. 1964), in support of his claim that he should have been granted a severance because he wished to testify as to count one but not as to count two. *Cross*, however, was expressly limited in *Baker* v. *United States*, 401 F.2d 958, 976-977 (D.C. Cir. 1968), cert. denied, 400 U.S. 965 (1970). There, the court held that "no need for a severance exists until the defendant makes a convincing showing that he has both important testimony to give concerning one count and strong need to refrain from testifying on the other." *Id.* at 977 (footnote omitted). Only if the defendant makes such a showing can the court properly "weigh the considerations of 'economy and expedition in judicial administration' against the defendant's interest in having a free choice with respect to testifying." *Ibid.* (footnote omitted). Other courts of appeals have similarly rejected the broad implications of *Cross*. See *United States* v. *Jamar*, 561 F. 2d 1103, 1108 n.9 (4th Cir. 1977); *United States* v. *Jardan*, 552 F. 2d 216, 220 (8th Cir.), cert. denied, 433 U.S. 912 (1977); *United States* v. *Weber*, 437 F.2d 327, 334-335 (3d Cir. 1970), cert. denied, 402 U.S. 932 (1971). In this case, petitioner failed to make any such showing. In his motion for a severance (see C.A. App. 17A), he alleged only that there appeared to be "a very real possibility" that he would want to testify as to count one but not as to count two. He failed to indicate what "important testimony" he could give with respect to count one or why he had a "strong need" to refrain from testifying as to count two. Accordingly, the district court properly denied petitioner's motion for a severance.

5. Finally, petitioner argues (Pet. 17-19) that he was given an unduly harsh sentence compared to Hutchinson, who pleaded guilty and received only a three-year sentence, all but six months of which was suspended.

The terms of Hutchinson's sentence were set under a plea agreement that was approved by the court. Because of Hutchinson's psychiatric problems, he was placed on probation following service of a six-month jail term, on the condition that he commit himself to a psychiatric hospital or make arrangements for continued psychiatric care (see Tr. 102-105). By accepting the terms of the plea bargain, including the agreed-upon sentence for Hutchinson, the court did not in any way bind itself with respect to the sentence that it could properly give petitioner.

As petitioner's counsel conceded at the sentencing hearing (Tr. 148), petitioner had two prior federal convictions for which he had served a term of imprisonment, and he had been prosecuted and fined on criminal charges in Canada. In light of petitioner's prior record and the evidence that he was involved in a major drug distribution operation, his sentence, which was less than half the statutory maximum, was clearly within the district court's discretion to impose. See *Dorszynski* v. *United States*, 418 U.S. 424, 431 (1974).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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Solicitor General

PHILIP B. HEYMANN
Assistant Attorney General

NOVEMBER 1979

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